IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPEAL No. 76 of 2002

COMMISSIONER OF INCOME TAX
V/S
HINDUSTAN ZINC LTD

Mr. KK BISSA, for the appellant / petitioner

Mr. ANJAY KOTHARI, for the respondent

Date of Order : 21.11.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

ORDER

This appeal has been filed by the Revenue against the judgment of the Income Tax Appellate Tribunal dt. 30.10.2001 under Section 260A of the Income Tax Act.

This appeal was admitted on 29.1.2003 by framing the following substantial question of law:-

> "Whether on the fact and in the circumstances of the case the ITAT was justified in law in directing the assessing officer to allow the deduction of Rs. 4,13,37,165/- disallowed by him u/s 40(a) of the Income-tax Act and confirmed by the CIT(A) out of the claim of the assessee U/s 35 AB amounting to Rs. 8,10,37,633/- ignoring the facts and material brought on record?"

Arguing the appeal it was contended by the learned counsel for the appellant that in para-15 after taking into

account the stipulations contained in the agreement between the assessee and the contractor which agreement was entered on 28.2.87 that the amount was payable by the assessee to the contractor, and negativing the contention of the assessee it was held as under:-

> "We, therefore, reject this contention of the learned counsel for the assessee and held that the liability in respect of fees for technical services provided by M/s DML to the assessee company had actually accrued as per the terms and conditions of the agreement entered into by these two parties....."

Prior to this it has also been held as under:-

> "In that view of the matter, we find no merit in the contention of the learned counsel for the assessee that the fees was never payable by the assessee company to M/s DML and, therefore, the income from the same having not been deemed to accrue or arise in India within the meaning of Section 9(1)(vii), was not chargeable under the Income-tax Act, 1961."

As against this while passing the impugned order, in para-18 the learned Tribunal has arrived at diametrically contrary finding by holding as under:-

> "From the perusal of the above, it is evident that the amount of fees for technical services was never payable by the assessee company to M/s DML outside India."

It appears that while recording this finding in para-18, the learned Tribunal went into the question of

manner and method of making payment agreed upon between the concerned parties. It is contended that as a matter of fact from the record it is clear that the amount was payable by the assessee to M/s. DML outside India, and therefore, the deduction could not be allowed in view of the provisions of Section 40(a).

On the other hand, learned counsel for the respondent submits that in view of the clear finding as recorded in para-18 the deduction was rightly granted, and the finding as recorded in para-15 are not the finding to the effect that the amount was payable by the assessee to M/s. DML outside India. According to learned counsel, it is clear on record that the amount was to be paid to the assessee to the Government of India, and thereafter what was to be done by the Government of India is not concerned with the assessee rather the amount was paid to DML by Crown Agents from out of the grant made by the U.K. Government, and therefore, the findings recorded in para-18 do not require any interference by this Court.

We have considered the submissions, and have gone through the impugned judgment.

In our view, it is more than clear from the above quoted portions of the judgment of the learned Tribunal that wholly irreconcilably contrary findings have been

recorded by the learned Tribunal in para-15 and 18, and therefore, instead of going into the merits of the question as to whether the assessee is entitled to deduction under Section 35AB, or that it is disentitled to deduction by virtue of provisions of Section 40(a) as it then existed for the relevant period, we think it appropriate to set aside the impugned judgment, and send the matter back to the learned Tribunal to consider the matter afresh after hearing both the parties, and thereafter arrive at a categorical conclusion as may be deducable from the record and in accordance with law. The parties are directed to appear before the learned Tribunal on 17.12.2007. Obviously since the matter is very old, the learned Tribunal is expected to decide the matter most expeditiously.

Accordingly, the appeal is allowed. The impugned judgment of the learned Tribunal is set aside, and the matter is remitted back to the Income Tax Appellate Tribunal as above.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.

/sushil/